AMSIAH RAHIM v. BORNEO SAMUDERA SDN BHD

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[SUIT NO: SDK-22-35-6-2012]
31 JANUARY 2021

DAMAGES: *Assessment – Loss of use of property – Whether plaintiff suffered loss arising from deprivation of use of land – Whether plaintiff was seeking restitutionary damages instead of compensatory damages – Claim anchored on gains-based remedy – Whether only allowed where financial loss unidentifiable – Whether claim for damages allowed*

The plaintiff, the registered owner of a land in the district of Lahad Datu, Sabah ('land') since 11 June 1998, sued the defendant for trespass over the land. The plaintiff's case was that the defendant had been occupying the land for the purpose of planting oil palms and had therefore profited from the trespass and, as such, the plaintiff was entitled to claim, from the defendant, the profits it made from the trespass. The High Court granted the plaintiff's claim but only awarded a nominal sum of RM1,000 as damages. The plaintiff appealed. The Court of Appeal allowed the appeal and remitted the case for the assessment of damages. Hence, this matter on assessment of damages. The plaintiff prayed for, *inter alia*: (i) award of compensatory damages of RM563,678.55 being profits made by the defendant from the land; and (ii) exemplary damages of RM140,919.64 amounting to 25% of the compensatory damages. The issues for the court's determination were (i) whether the plaintiff was entitled to compensation by reason of the defendant's occupation on the land before 1998 and had continued to do so until 12 December 2014; (ii) if so, what was the amount of damages the plaintiff was entitled to; and (iii) whether the plaintiff was entitled to claim general damages and/punitive and exemplary damages.

Held (dismissing plaintiff's claim for damages with costs):

(1) Although the plaintiff used the term 'compensatory damages', the plaintiff was not seeking to be compensated for what she had lost, but instead, for restitutionary damages, *ie,* the profits obtained by the defendant in working on the plaintiff's land for the period of the trespass. The plaintiff's claim of RM563,678.55 was not only made up of the sum of RM407,282.19, allegedly admitted as being the defendant's profit gained from the land, but a further sum of RM156,396.36 which the plaintiff contended was more representative of the 'actual profits' made by the defendant. (paras 10 & 27)

(2) The grant of gains-based remedy is to compensate the claimant who could not demonstrate any identifiable financial loss. It was not the plaintiff's case that she did not suffer any loss so that she should be

compensated by the grant of a restitutionary award based on the defendant's personal gain. The whole tenor of the plaintiff's case was that she had suffered loss and damages arising from being deprived from the use of the land. Having elected to claim for damages on the basis of loss of use, the plaintiff could not now shift gears and claim for damages on the basis of the defendant's gains. Furthermore, the fact that the plaintiff was able to identify her financial loss meant that there was no justifiable reason to allow her gains-based remedy. (paras 32, 34 & 37)

(3) The relevant principle in the law of tort is to restore the injured party to the situation which would have prevailed had no injury been sustained – *restitutio in integrum*. Further, the principle that the award of damages is not to include any element of profit similarly applies in an action for tort. To allow the plaintiff's claim would be contrary to the well-established legal principles. Therefore, the plaintiff's claim for the sum of RM563,678.55 as 'compensatory damages' failed. Consequently, the claim for punitive and/or exemplary damages premised on the claimed sum also failed. (paras 36 & 38)

Case(s) referred to:

A-G v. Blake [2000] 4 All ER 385 ***(refd)***

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(refd)***

Amm Joy (Suing As Chairman Committee Members Of Wat Boonyaram) v. Chuan Seng Sdn Bhd [2018] 1 LNS 474 CA ***(refd)***

Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors And Another Appeal [2007] 1 CLJ 1 CA ***(refd)***

Devenish Nutrition Ltd And Others v. Sanofi-Aventis SA (France) And Others [2007] EWHC 2394 ***(refd)***

Inverugie Investments Ltd v. Hackett [1995] 1 WLR 713 ***(refd)***

Johandra Realty Sdn Bhd & Satu Lagi lwn. Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia & Satu Lagi [2021] 2 CLJ 485 CA ***(refd)***

Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 CA ***(refd)***

Ministry of Defence v. Ashman [1993] 66 P & CR 195 ***(refd)***

Penarth Dock Engineering Co Ltd v. Pounds [1963] 1 Llyod's Rep 359 ***(dist)***

Stoke-on-Trent City Council v. W & J Wass Ltd [1988] 3 All ER 394 ***(refd)***

Swordheath Properties Ltd v. Tabet [1979] 1 WLR 285 ***(refd)***

Villa Putra Management Corporation v. Mayland View Sdn Bhd [2014] 1 LNS 1096 HC ***(dist)***

For the plaintiff - Edwin Tsen & Caroline Hee; M/s Tan Pang Tsen & Co

For the defendant - Ho Kin Kong & Jeremy Ho; M/s Ho Chong Yong

Reported by S Barathi

JUDGMENT
(encl. 66)

Celestina Stuel Galid J:

Introduction

[1] The matter before the court is the assessment of damages pursuant to the order of the Court of Appeal dated 19 January 2017 ("COA order").

Background

[2] The plaintiff, the registered owner of the land held under NT 113039115, in the district of Lahad Datu, Sabah ("the land") had sued the defendant for trespass over the land.

[3] After a full trial, on 17 November 2015, the High Court granted the plaintiff's claim but only awarded a nominal sum of RM1,000 as damages. The plaintiff appealed.

[4] The Court of Appeal allowed the plaintiff's appeal and remitted the case back to this court for the assessment (of damages).

Agreed Facts

[5] The parties have agreed to the following facts:

1. The Plaintiff is the registered owner of the Land since 11.06.1998;

2. By a letter dated 23.02.2012 from the Plaintiff's solicitors to the Defendant, the Plaintiff requested the Defendant to deliver possession of the Land to the Plaintiff within 14 days; and

3. The Defendant had been in possession of the Land even before the Plaintiff had purchased the Land and had only delivered possession to the Plaintiff on 12.12.2014.

Agreed Issues

[6] The parties identified the following issues for the court's determination in these proceedings:

1. Whether the Plaintiff is entitled to compensation due to the Defendant had been occupying the Land before 1998 and has continued to do so until 12.12.2014; and

2. If so, what is the amount of damages the Plaintiff is entitled to?

[7] In addition, the plaintiff added the following issue:

Whether the Plaintiff is entitled to claim general damages and/punitive and exemplary damages as prayed for at Enclosure 7, prayer (iv) of the Amended Statement of Claim dated 28.08.2012.

[8] The defendant is not agreeable to the additional issue.

This Court's Decision

[9] In the plaintiff's written submission (para. 19.1, encl. 124), the plaintiff had prayed for the following:

> (i) compensatory damages of RM563,678.55 to be awarded to the Plaintiff being the profits made by the Defendant from the Land;
>
> (ii) exemplary damages of RM140,919.64 amounting to 25% of the compensatory damages to be awarded to the Plaintiff [RM563,678.55 x 25% = RM140,919.64];
>
> (iii) Costs of RM30,000.00 [costs for PW1 RM10,000.00 and costs for the assessment proceedings RM20,000.00];
>
> (iv) Interest at 5% pa under Section 11 of the Civil Law Act 1956 with effect from the date of trespassing until judgment and thereafter statutory interest at the rate of 5% pa from date of judgment until full payment;
>
> (v) Prayers (i) to (iv) are to be paid to the Plaintiff within one (1) month from the date of the Order.

[10] Although the plaintiff used the term "compensatory damages", a reading of the plaintiff's submission on this head of claim shows that the plaintiff is in fact not seeking to be compensated for what she has lost (in this case, the use of the land) (see *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93) but instead, for restitutionary damages ie, the profits obtained by the defendant in working on the plaintiff's land for the period of the trespass in question and relying on the case of *Villa Putra Management Corporation v. Mayland View Sdn Bhd* [2014] 1 LNS 1096 and *Penarth Dock Engineering Co Ltd v. Pounds* [1963] 1 Llyod's Rep 359.

[11] The plaintiff had, *inter alia*, submitted as follows:

> 11.4 The Defendant had been occupying the said Land for the purpose of planting oil palms and had therefore profited from the trespass and as such, the Plaintiff is entitled to claim from the Defendant the profits it had made from the trespass.
>
> 11.5 The measure of damages is therefore not what the Plaintiff had lost but **the benefit of gain** the Defendant had obtained by having use of the property. The Plaintiff is not required to show proof of any damages. The Plaintiff will be claiming for damages on the profits made by the Defendant and also for exemplary damages for depriving the Plaintiff of the use of her own land with complete disregard to the feelings of the Plaintiff and it was to maximize the profits.
>
> (emphasis added)

[12] I find merits in the submissions by learned counsel for the defendant that the plaintiff's stand is now contradictory to what was pleaded in her amended statement of claim, opening speech and the evidence led during the trial.

[13] To elaborate, in para. 12 of her amended statement of claim, the plaintiff had averred as follows:

> 12. The Plaintiff had no choice but to start the writ in order to gain back the possession of the said land from the Defendant and also to claim damages from the Defendant for trespass over the years. **The Plaintiff had suffered damages and loss from the trespass of the said land because she had been deprived of the use of her rightful land over the years**.
>
> (emphasis added)

[14] In his opening statement (encl. 118), learned counsel for the plaintiff stated the following:

> 3. ... The Plaintiff will rely on the testimony of the expert *to show the damages she had suffered due to being deprived of the use of her own land. The Plaintiff's evidence will show that she would have been able to make a profit if she had been able to enter into her own land to develop it into an oil palm estate.*
>
> (emphasis added)

[15] PW1, the plaintiff's expert witness testified (Q&A 10, PW1-WS) that he was instructed to prepare an expert report on the following:

> 1. analyse the costs of the production of the Plaintiff's land;
>
> 2. the expected yields for the size of the Plaintiff's land planted with oil palms; and
>
> 3. the profits which the Plaintiff could have made if she had cultivated the land by herself.

[16] PW2, the plaintiff's husband also testified as to the plaintiff's intention on the use of the land, that is to cultivate it into an oil palm estate and that had the defendant not kept them from the land, they would have been able to enjoy the income from selling the oil palm fruits after three or four years of planting (Q&A 7, PW2-WS).

[17] As can be discerned from the above, the plaintiff's claim for damages is very much grounded upon the allegation that she had been deprived of the use of the land and not that the defendant had profited from using the land.

[18] Learned counsel for the defendant submitted that having elected to claim as such, the plaintiff is precluded from retracting and is estopped from retreating from the position she has adopted by the election citing the Court of Appeal case of *Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors And Another Appeal* [2007] 1 CLJ 1 and *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 CLJ 629; [1997] 3 MLJ 323 as support.

[19] In response to the defendant's contentions, the plaintiff submitted that there was no difference between the two measures of damages and that the plaintiff should be awarded for the trespass even without proof of damage.

[20] As the plaintiff had heavily relied on the case of *Villa Putra* (*supra*) and *Penarth* (*supra*) to contend as such, it would be of assistance to consider the facts of these cases.

[21] In *Villa Putra*, the plaintiff claimed for damages for trespass. The plaintiff elected to claim for damages on the basis of loss of use. In deciding as to what was the applicable measure of damages, SM Komathy Suppiah JC (as she then was) considered English cases dealing with the issue namely *Ministry of Defence v. Ashman* [1993] 66 P & CR 195; *Stoke-on-Trent City Council v. W & J Wass Ltd* [1988] 3 All ER 394; *Swordheath Properties Ltd v. Tabet* [1979] 1 WLR 285; and *Inverugie Investments Ltd v. Hackett* [1995] 1 WLR 713.

[22] Her Ladyship then came to the following conclusion:

> 26. The cases quoted above illustrate that in trespass, *a plaintiff can claim for either loss of use of his land or the profit the defendant has made by using his land*. A claim for market rent for loss of use pursuant to the user principle is on the basis of the amount that the plaintiff would have obtained if he had let the property. A plaintiff seeking market rent does not have to show that he would actually have let the premises in the relevant period; *if he would not have let the property he is, in fact seeking restitution of the defendant's unjust enrichment arising from the benefit the defendant had obtained by having use of the property. He would likewise be seeking restitution of the defendant's unjust enrichment if he sought to claim the profits which the defendant actually made. The measure of damages is therefore not what the plaintiff has lost, but the benefit or gain the defendant has obtained by having use of the property*. See *Penarth Dock Engineering Co Ltd v. Pounds* [1963] 1 Lloyd's Rep 359.
>
> (emphasis added)

[23] In *Penarth*, the plaintiffs and the defendant had agreed for the sale and purchase of a floating pontoon then occupying part of the dock premises let to the plaintiffs. Despite the oral agreement that the defendant was to remove the pontoon as speedily as practicable or as soon as possible, the defendant failed to do resulting in the plaintiff suing the defendant for trespass and for damages.

[24] Lord Denning held as follows:

> The question which remains is, what are the damages? True it is that the Penarth company themselves would not seem to have suffered any damage to speak of. They have not to pay any extra rent to the British Transport Commission. The dock is no use to them; they would not have made any money out of it. But nevertheless, in a case of this kind as I read the law, starting with *Whitwham v. Wesminster Brymno Coal and Coke*

> *Company,* [1896] 2 Ch 538, on which I commented myself in the case of *Strand Electric and Engineering Company, Ltd v. Brisford Entertainments, Ltd*., [1952] 2 QB 246, at pp. 253 to 254, **the test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant obtained by having the use of the berth**.
>
> (emphasis added)

[25] Learned counsel for the plaintiff further submitted that the plaintiff is in fact not claiming under both measures of damages but that she had elected to claim for the profits allegedly made by the defendant from the use of the land.

[26] To my mind, the issue in the present case is not whether the plaintiff is in fact claiming under both measures of damages – the plaintiff has made her election very clearly that she is seeking for the defendant's profits as damages. The question before this court is twofold: whether the plaintiff is entitled to the defendant's profits as damages and if not, whether having made such election, the plaintiff's claim for damages must fail.

[27] At the outset, I must note that the plaintiff had steered clear from using the words "restitution" and/ or "restitutionary damages". However, the effect of the plaintiff's claim and the reliance on the *dicta* by the court in *Villa Putra* leaves me no doubt that the plaintiff was, in essence, claiming for restitutionary damages as opposed to compensatory damages. This is apparent in that the plaintiff's claim of RM563,678.55 is not only made up of the sum of RM407,282.19 allegedly admitted by DW2 as being the defendant's profit gained from the land but a further sum of RM156,396.36 which the plaintiff contended was more representative of the "actual profits" made by the defendant. In short, the plaintiff is claiming for whatever profits the defendant had gotten from the use of the land.

[28] It is, I would say, for a claim termed by Mary Lim JCA (as she then was) in *Amm Joy (Suing As Chairman Committee Members Of Wat Boonyaram) v. Chuan Seng Sdn Bhd* [2018] 1 LNS 474; [2018] 5 MLJ 255, as "disgorgement of profits". The appeal in that case was against the decision of the High Court in affirming the award of damages for trespass by the Senior Assistant Registrar. In the course of deliberation as to the correct principles for measuring damages for trespass, the Court of Appeal said the following:

> [23] We do not propose to go into the question of whether the award of damages in trespass is compensatory or restitutionary depending on whether it is viewed on a 'loss' or a 'gain' basis (described as the 'Rashomon effect' in *The User Principle – Rashomon Effect or Much Ado about Nothing* by Kelvin FK Low (2016) 28 SAcLJ 984; see also discussions by the English Court of Appeal in *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) And Others* [2008] 2 All ER 249; [2007] EWHC 2394 (Ch)).

A [24] That discourse would be unnecessary since the respondent's allegations in this appeal (see affidavits filed in support of the assessment hearing), that the appellant had benefited from its trespass when it collected substantial sums in the sale of niches in the columbarium, were not made with a view to requiring the appellant to account profits made from the wrongful use of the land; or for a disgorgement of those profits, B under the law of restitution. Those allegations were made by the respondent for the purpose of showing that the appellant was financially able to pay damages. And, this is where the learned judge fell into error when he took that into consideration without more.

[29] Although the Court of Appeal was not required to deal with the C question of whether the claim was for restitutionary damages, the court's reference to the case of *Devenish Nutrition Ltd And Others v. Sanofi-Aventis SA (France) And Others* [2007] EWHC 2394 offers an insight as to the reasoning and application of the principles of restitution in claims for damages in tort.

[30] There, Lewison J noted Lord Nicholls' following reasoning in D *A-G v. Blake* [2000] 4 All ER 385:

> Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for E the wrong done to the plaintiff is measured by a different yardstick.

[31] Lewison J further went on to state:

> [80] … He (Lord Nicholls) referred to the difficulty of aligning this measure of damages within the basic compensatory measure. He noted that the 'label' of restitutionary damages had been applied to damages F calculated on this basis, although he regarded it as an 'unhappy phrase'. His conclusion was that:
>
> > these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is G that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule.' (See [2000] 4 All ER 385 at 392, [2001] AC 268 at 279.)
>
> H [81] These observations do not, in my judgment, support the view that Lord Nicholls was supporting a restitutionary award based on the defendant's personal gain. In the price or hire cases, the damages have been assessed as user damages. This is an objective measure and is awarded where, in financial terms, the claimant has suffered no loss. It I is not a case of a claimant having suffered financial loss but having evidential difficulties in proving it. It is precisely because he has suffered no loss that the law's response is to seek a different way to compensate him for the invasion of his rights.

> [82] However, Lord Nicholls went on to examine cases in which a court of equity would grant a claimant an account of profits. This went further than the common law, because the wrongdoer was required to disgorge all his gains. Equity adopted this approach in cases where it was difficult to quantify the financial loss that the victim has suffered.

[32] From my reading of *Devinish* (*supra*), the reasoning behind the grant of a gains- based remedy is to compensate the claimant who cannot demonstrate any identifiable financial loss.

[33] Thus, when Lord Nicholls stated in *Stoke-on-Trent City Council v. W & J Wass Ltd* (*supra*) that the "user principle" need not be characterised as exclusively compensatory, or exclusively restitutionary and that it combines elements of both, it cannot be taken to mean that the plaintiff is automatically entitled to the defendant's profits as what the plaintiff herein seems to suggest. This is apparent from Lord Nicholls' preceding statement in *Stoke-on-Trent City Council v. W & J Wass Ltd* that "under the user principle, he (the trespasser) is obliged to pay a reasonable rent for the use which he has enjoyed".

[34] Here, it is not the plaintiff's case that she did not suffer any loss so that she should be compensated by the grant of a restitutionary award based on the defendant's personal gain. In fact, as shown earlier in paras. [12] to [16] the whole tenor of the plaintiff's case was that she had suffered loss and damages arising from being deprived from the use of the land. That was the reason why PW1, the plaintiff's expert was called to give evidence (see para. [15] above). However, it is of significance that despite having allegedly paid PW1 the sum of RM10,000 as his professional fees (Q&A 10 and 11, notes of proceeding), the plaintiff did not rely on his conclusion at all when submitting on the damages payable by the defendant. This was hardly surprising as PW1's conclusion (p. 2, exh. "P1") on the plaintiff's projected profit was much lesser:

> In conclusion, based on the performance of AJCESB, the estimated average profit which the Plaintiff can make from 2001 to 2015 is RM2,857.50 per hectare x 6.229 hectares x 15 years which would amount to RM266,990.50.

[35] I must note that the cases cited by the plaintiff on this issue, ie, *Villa Putra* and *Penarth* are distinguishable in that in *Villa Putra*, the plaintiff elected to claim for damages on the basis of loss of use while in *Penarth*, Lord Denning expressly noted that the benefit obtained by the defendant should not be put as high as what he would have to pay elsewhere.

[36] But there is another reason why the claim for the defendant's profits should fail in the instant case. It is trite law that the relevant principle in the law of tort is to restore the injured party to the situation which would have prevailed had no injury been sustained – *restitutio in integrum*. Further, the

principle that the award of damages is not to include any element of profit similarly applies in an action for tort (see *Johandra Realty Sdn Bhd & Satu Lagi lwn. Ketua Pengarah Jabatan Pengairan Dan Saliran Malaysia & Satu Lagi* [2021] 2 CLJ 485; [2020] MLJU 1972). To allow the plaintiff's claim would be contrary to these well-established legal principles.

[37] Based on all of the above, I would conclude that having elected to claim for damages on the basis of loss of use, the plaintiff cannot now shift gears and claim for damages on the basis of the defendant's gains. In any event, the plaintiff's pleaded case and evidence do not support such claim. Furthermore, the fact that the plaintiff was able to identify her financial loss (through PW1's evidence) meant that there is no justifiable reason to allow her a gains-based remedy.

Conclusion

[38] I would therefore hold that the plaintiff's claim for the sum of RM563,678.55 as "compensatory damages", fails. Consequently, the claim for punitive and/or exemplary damages which is premised on the said sum claimed of RM563,678.55 also fails.

[39] As the plaintiff had solely anchored her claim on the defendant's profits and effectively abandoned her claim for damages for loss of use, I am constrained to dismiss the plaintiff's claim for damages with costs subject to allocatur.